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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JOHN CANTU,

Plaintiff and Respondent,

v.

MICHAEL THOMAS,

Defendant and Appellant.

E046183

(Super.Ct.No. RIC462592)

OPINION

APPEAL from the Superior Court of Riverside County. Joan F. Burgess and
Paulette Durand-Barkley, Temporary Judges. (Pursuant to Cal. Const., art. VI, § 21.)
Affirmed.

Russell P. Nowell for Defendant and Appellant.

Christopher C. Carter for Plaintiff and Respondent.

1. Introduction

Michael Thomas appeals from a default judgment obtained against him by John
Cantu. We affirm.

2. Factual and Procedural Background

a. The Complaint

In December 2006, Cantu filed a verified complaint for breach of contract and other causes of action against Thomas. The complaint alleged the two men had joined in a venture to buy and sell, or “flip,” a Corona residence but Thomas had failed to perform. In four separate causes of action,¹ Cantu asked for general damages exceeding \$100,000 and punitive damages.

b. Entry of Default

On February 21, 2007, Cantu filed a proof of service of summons, declaring that Thomas was personally served on January 8, 2007. Also on February 21, 2007, Cantu filed a request for entry of default, which the court entered.

On February 23, 2007, Thomas, acting in propria persona, and Cantu, represented by counsel, appeared in court for an ex parte hearing. Thomas denied that he had been served.

After an attempt at court-ordered mediation did not succeed on March 13, 2007, the court ordered the parties to cooperate in selling the subject property.

On April 30, 2007, Thomas, still representing himself, filed a motion for relief from default, including a proposed answer and cross-complaint. In his supporting declaration, Thomas asserted the court file contained the wrong proof of service from a

¹ Breach of contract, breach of fiduciary duty, fraud, and conversion.

different case.² Additionally, Thomas claimed his correct address was 726 Hearst Way, not 725 Hearst Way. Thomas was not served with the complaint but Thomas said his neighbor saw a woman throw some papers near his house and she gave them to him. In the mail, Thomas also received a partial copy of the complaint but it did not include the first page with the case caption and the address of Cantu's attorney. Invoking Code of Civil Procedure sections 415.10, 415.20, and 473, subdivision (b), Thomas asked that the court vacate the entry of default and file his answer and cross-complaint.

Cantu opposed the motion on the grounds Thomas had not shown mistake, inadvertence, surprise, or excusable neglect, justifying discretionary relief under Code of Civil Procedure section 473.

At the hearing, the court found that Thomas had been personally served and his delay after February 23, 2007, was not excusable neglect. The court denied the motion.

c. Reconsideration Motion

Subsequently, on June 29, 2007, Thomas filed a motion for reconsideration. (Code Civ. Proc., § 1008.) Supporting the motion was a copy of Thomas's answer purportedly served by mail on Cantu on February 23, although the proof of service does not show a mailing address for Cantu. In August 2007, Thomas finally obtained a lawyer. Both parties filed supplemental briefing. The court denied the reconsideration motion.

² *Allied Interstate Inc. v. Robin Collins, dba Boss Screenplay et al.*, RIC 462259.

d. Default Judgment

On May 9, 2008, the court entered judgment against Thomas for general damages in the amount of \$186,569.76; punitive damages in the amount of \$20,000; prejudgment interest; and costs of \$587, for a total judgment of \$207,569.76.

Thomas filed a notice of appeal of the default judgment on July 7, 2008.

3. Discussion

Thomas challenges the default judgment based on the underlying entry of default and the denial of his motion for relief under Code of Civil Procedure section 473. Additionally, he questions the amount of general and punitive damages awarded in the complaint.

a. Entry of Default

Cantu asserts that because Thomas bases his claim of error on the entry of default on February 21, 2007, his appeal is untimely and the issue is waived. Cantu is wrong on this point. Issues relating to the granting of Thomas's motion to set aside the entry of default may be raised on appeal from the judgment: "Established California decisional law provides that no appeal lies from an order granting a motion to vacate a default upon which no default judgment has been entered." (*Velicescu v. Pauna* (1991) 231 Cal.App.3d 1521, 1522; Code Civ. Proc., § 904.1, subd. (a).) Neither the order denying Thomas's default motion nor the motion for reconsideration was appealable: "... orders denying motions for reconsideration are not appealable." (*Annette F. v. Sharon S.* (2005) 130 Cal.App.4th 1448, 1459.) Therefore, Thomas's timely appeal from the default judgment is proper.

Nevertheless, Thomas does not succeed on appeal. “To obtain discretionary relief under [Code of Civil Procedure] section 473, the moving party must show the requisite mistake, inadvertence, or excusable neglect. [Citations.]” (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 694.) “Generally speaking, the trial court’s ruling on a discretionary motion for relief is reviewed for an abuse of discretion. . . . [¶] In denying appellant’s motion here, the trial court implicitly determined that he failed to establish entitlement to relief.” (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419-1420.)

Most of Thomas’s arguments depend on his effort to reinterpret the factual record in his favor. But here the record supports the court’s findings on grounds of inexcusable neglect: “To warrant relief under section 473 a litigant’s neglect must have been such as might have been the act of a reasonably prudent person under the same circumstances.” (*Elms v. Elms* (1946) 72 Cal.App.2d 508, 513.) Furthermore, “[i]t is the duty of every party desiring to resist an action . . . to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473 will be denied.” (*Ibid.*) “The law frowns upon setting aside default judgments resulting from inexcusable neglect of the complainant.” (*Ibid.*; *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 907.)

Applying these principles, we conclude the trial court did not abuse its discretion in finding Thomas’s neglect inexcusable and denying Thomas’s motion for relief under Code of Civil Procedure section 473. The trial court found Thomas had been personally

served on January 8, 2007. Even after appearing in court on February 23, 2007, Thomas waited another two months before filing a motion for relief. Altogether, Thomas delayed almost four months after being personally served before he took action to avoid default. Under these circumstances, the trial court did not abuse its discretion in denying his relief motion.

b. Damages

The subject property was lost in foreclosure. Based on Cantu's various declarations, the court ordered a judgment of \$207,156.76, including general damages, costs, and punitive damages of \$20,000. Thomas protests that the complaint sought general damages of only \$100,000 and that he was never personally served with a statement of damages exceeding \$100,000, making the default judgment void.

The complaint sought total general damages of \$400,000 in addition to punitive damages and other forms of relief. Thomas mischaracterizes the complaint when he asserts it asks for only \$100,000. Four causes of action separately ask for \$100,000. Pursuant to Code of Civil Procedure section 580, Cantu was entitled to the relief as prayed for in the complaint. (*Singleton v. Perry* (1955) 45 Cal.2d 489, 498-499; *Meyer Koulish Co. v. Cannon* (1963) 213 Cal.App.2d 419, 434, citing *Meisner v. McIntosh* (1928) 205 Cal. 11 and *Frost v. Mighetto* (1937) 22 Cal.App.2d 612.)

Nor was Cantu required to serve a statement of damages pursuant to Code of Civil Procedure section 425.11, which applies to actions involving personal injury or wrongful death, not to this type of dispute. (*Levine v. Smith* (2006) 145 Cal.App.4th 1131, 1136-1137.) On the other hand, Cantu properly served Thomas with a statement of punitive

damages asking for \$40,000. (Code Civ. Proc., § 425.115.) The award of \$20,000 for punitive damages was also appropriate.

4. Disposition

We affirm the judgment. Cantu, the prevailing party, shall recover his costs on appeal.

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s/Gaut
J.

We concur:

s/McKinster
Acting P. J.

s/King
J.